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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. IAN O'CONNOR, Defendant and Appellant.	A155367, A155526 (Napa County Super. Ct. No. CR184881, 18CR001419)

Pursuant to a plea agreement, defendant Ian O'Connor pleaded no contest to two counts of assault with a deadly weapon and admitted he personally inflicted great bodily injury, and he had a prior strike conviction. He was sentenced to 12 years in prison as stipulated in the agreement. On appeal, defendant seeks remand for resentencing. We dismiss the appeal because he failed to obtain a certificate of probable cause.

FACTUAL AND PROCEDURAL BACKGROUND

Case No. CR184881

In December 2017, the Napa County District Attorney filed an amended information charging defendant with assault with a deadly weapon, to wit, a bat (Pen. Code,[1] § 245, subd. (a)(1); count 1), based on an incident alleged to have occurred on September 29, 2017. It was alleged defendant personally used a deadly weapon

[1] Further undesignated statutory references are to the Penal Code.

(§ 12022, subd. (b)(1)) and personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)) in commission of the assault.

The district attorney further alleged that defendant had three prior strike convictions (§ 667, subds. (b)–(i)), two prior serious felony convictions (*id*., subd. (a)(1)), and four prison priors (§ 667.5, subd. (b)).

Case No. 18CR001419

In May 2018, the Napa County District Attorney filed a nine-count information against defendant based on conduct alleged to have occurred on April 27, 2018. Defendant was charged with two counts of assault with a deadly weapon, to wit, a knife (§ 245, subd. (a)(1); counts 1 and 2), felony criminal threats (§ 422; count 3), first degree burglary (§ 459; count 4), felony dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1); count 5), felony elder abuse (§ 368, subd. (b)(1); count 6), felony false imprisonment by violence (§ 236; count 7), misdemeanor obstruction of a peace officer (§ 148, subd. (a)(1); count 8), and misdemeanor interference with a wireless communication device (§ 591.5; count 9). As to counts 1 through 5 it was alleged that defendant personally used a deadly weapon (§ 12022, subd. (b)(1)) in commission of the offense.

The district attorney further alleged that defendant was released from custody on bail or his own recognizance at the time he committed the offenses (§ 12022.1), that he had two prior strike convictions (§ 667, subds. (b)–(i)), two prior serious felony convictions (*id*., subd. (a)(1)), and four prison priors (§ 667.5, subd. (b)).

Plea Agreement

On June 27, 2018, the parties reached a negotiated disposition of both criminal cases. Defendant agreed to a stipulated 12-year sentence in state prison to be served at 85 percent time. In case No. CR184881, defendant pleaded no contest to assault with a deadly weapon and admitted the special allegation that he personally inflicted great bodily injury. He also admitted a single prior strike conviction. In case No. 18CR001419, defendant pleaded no contest to one count of assault with a deadly weapon.

He also agreed to a *Harvey* waiver.[2] In exchange for defendant's pleas, the prosecutor moved to dismiss the remaining counts and special allegations, and the trial court granted the motion.

Sentencing

Sentencing was held on August 30, 2018. In case No. CR184881, the trial court imposed 11 years for count 1, assault with a deadly weapon, composed of the upper term of four years doubled to eight years because of the prior strike offense, plus three years for infliction of great bodily injury. In case No. 18CR001419, the trial court imposed a consecutive year (one-third the midterm) for an aggregate sentence of 12 years in prison.

DISCUSSION

Defendant contends his case must be remanded for resentencing "so that the trial court can exercise its discretion in light of recently passed Senate Bill 1393." Senate Bill No. 1393 (S.B. 1393) amended sections 667 and 1385 to allow a court to exercise its discretion to strike or dismiss prior serious felony convictions for sentencing purposes effective January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971; Stats. 2018, ch. 1013, §§ 1–2.)

Defendant's contention makes little sense given that the allegations of prior serious felony convictions under section 667, subdivision (a), were *dismissed* as part of the negotiated disposition. As a result, defendant did not receive any enhancements for prior serious felony convictions when he was sentenced in 2018, so there are no enhancements that potentially could be dismissed under S.B. 1393 on remand.

The Attorney General points out that S.B. 1393 does not apply in defendant's case and also argues the appeal must be dismissed because defendant did not obtain a

[2] "A *Harvey* waiver permits a trial court to consider facts underlying dismissed counts in determining the appropriate disposition for the offense of which the defendant was convicted." (*People v. Moser* (1996) 50 Cal.App.4th 130, 132–133; see *People v. Harvey* (1979) 25 Cal.3d 754.)

certificate of probable cause as provided by section 1237.5.[3] Our Supreme Court has explained, "[A] certificate of probable cause is required if the challenge goes to an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement." (*People v. Johnson* (2009) 47 Cal.4th 668, 678.)[4]

Defendant responds that a certificate of probable cause is not required here because he is not attacking his plea; rather, he is challenging the trial court's exercise of its sentencing discretion, citing *People v. Buttram* (2003) 30 Cal.4th 773 (*Buttram*). In *Buttram*, our high court recognized, "[A] certificate of probable cause is not required to challenge the exercise of individualized sentencing discretion within an agreed maximum sentence. Such an agreement, by its nature, contemplates that the court will choose from among a range of permissible sentences within the maximum, and that abuses of this discretionary sentencing authority will be reviewable on appeal, as they would otherwise be." (*Id.* at pp. 790–791.)

Defendant argues his appellate claim falls within *Buttram* as follows: "[T]he trial court below might have sentenced differently had it known the five-year prior serious felony enhancements [which he did not receive] were subject to dismissal and appellant's maximum exposure was lower. . . . [A]ny felony plus a great bodily injury enhancement

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[3] Section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

[4] Initially, we acknowledge there is a split of authority on whether a certificate of probable cause is required when a defendant who was sentenced to a stipulated sentence pursuant to a plea bargain later seeks, on appeal, remand for resentencing under a later-enacted ameliorative statute. (*People v. Galindo* (2019) 35 Cal.App.5th 658, 662 [247 Cal.Rptr.3d 553, 555] review filed (June 26, 2019).) We need not resolve the issue in this case, however, because the prior serious felony allegations were dismissed under the plea agreement, so S.B. 1393 could not benefit defendant.

pled and proven is a violent felony. Appellant's plea bargain did not specify there had to be a violent felony. The trial court could have decided to dismiss the great bodily injury enhancement pursuant to Penal Code section 1385, which would have given appellant more custody credits by removing the effects of a violent felony. Or the court could have re-configured other parts of the sentence while still remaining within the plea bargain. These are possibilities; structuring the 12-year sentence would be up to the trial court's discretion after considering the new legislation."

The premise of defendant's argument is incorrect. In case No. CR184881, defendant agreed to enter a plea to assault with a deadly weapon (§ 245, subd. (a)(1)) and to admit infliction of great bodily injury (§ 12022.7) and a prior strike (§ 667, subds. (b)–(i)). The plea form defendant signed and initialed provided for a term based on the upper term of four years doubled for the strike, plus three years for the great bodily injury enhancement. Defendant expressly agreed, "I will be sentenced to 12 years state prison (11 years in CR184881 + 1 year consecutive in case 18CR001419) Restitution to victims in both cases, sentence to be followed by 3 years parole, *this charge is a violent felony. My sentence will be served @ 85%*." (Italics added.)

"Acceptance of [a plea] agreement binds the court and the parties to the agreement. [Citations.] ' "When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement." ' " (*People v. Segura* (2008) 44 Cal.4th 921, 930–931 (*Segura*).) "If the court does not believe the agreed-upon disposition is fair, the court 'need not approve a bargain reached between the prosecution and the defendant, [but] it cannot change that bargain or agreement without the consent of both parties.' " (*Id.* at p. 931.)

Here, since the parties agreed that the conviction in case No. CR184881 would be a violent felony, that defendant would admit the great bodily injury allegation, that he would receive a 12-year sentence, and that he would serve at 85 percent time, the trial court could not, on remand, simply strike the great bodily injury enhancement or otherwise "re-configure" the sentence so that defendant would not have to serve his

sentence at 85 percent time. " 'Once the court has accepted the terms of the negotiated plea, "[it] lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree." ' " (*Segura, supra,* 44 Cal.4th at p. 931.)

Because it appears defendant's only argument for remand is that he might receive a more favorable sentence than the plea agreement allows, he is *not* asking the trial court to exercise its discretion within the range of permissible sentences as in *Buttram*. Instead, he challenges "an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement." (*People v. Johnson, supra,* 47 Cal.4th at p. 678.) A certificate of probable cause is required for such a challenge. Because defendant admittedly did not obtain a certificate, his appeal is dismissed.

DISPOSITION

The appeal is dismissed.

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Miller, J.

We concur:

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Richman, Acting P.J.

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Stewart, J.

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